In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1369

WILLARD F. MOORE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–7a) is reported at 435 F. 2d 113.

JURISDICTION

The judgment of the court of appeals was entered on October 19, 1970. A petition for rehearing was denied on January 21, 1971. On February 19, 1971, the petition for a writ of certiorari was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the jury instruction regarding specific intent was adequate.

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2. Whether the absence of an instruction on the relation of intoxication to specific intent constituted error.

STATEMENT

After a jury trial in the United States District Court for the District of Columbia, petitioner was convicted of obtaining money by false pretenses (22 D.C. Code 1301) and grand larceny (22 D.C. Code 2201). He was sentenced to concurrent prison terms of one to three and three to nine years. The court of appeals affirmed.

The evidence showed that on September 12, 1968, Abraham Updike, responding to a knock at his apartment door, was confronted by a stranger who identified himself as a police detective (Tr. 55, 68). Moments later, there was another knock at the door, and the stranger admitted a second man, whom Updike identified in court as petitioner (Tr. 55, 66). Petitioner was introduced to Updike as a co-worker and "buddy" of the supposed detective (Tr. 57–58).[1] The "detective" then told Updike that the latter had been implicated in a narcotics offense and would have to post a $10,000 bond (Tr. 56–58, 68–69).[2] The "detective" then left the apartment, stating that he had to appear in court (Tr. 60).

Petitioner accompanied Updike to a savings and loan institution where he was to withdraw the $10,000 (Tr. 60–61). Carrying on a normal conversation, the two men walked from Updike's apartment to the

[1] It was stipulated by counsel that petitioner was not a member of any police force (Tr. 110).

[2] Police files revealed that Mr. Updike had no criminal charges lodged against him (Tr. 110–111).

savings and loan (Tr. 71).[3] While petitioner later claimed he was suffering from the effects of his drinking the night before and got sick two or three times along the way (Tr. 145),[4] Mr. Updike's testimony indicated that petitioner did not appear ill at any time (Tr. 71).

Upon reaching the savings and loan association, Mr. Updike went inside leaving petitioner outside (Tr. 61, 72, 145). The savings and loan had to obtain the money to honor the withdrawal from a bank down the street (Tr. 62, 82). James Smith, a representative of the savings and loan, accompanied Updike to the bank (Tr. 62, 82–83). As they left, Updike approached petitioner and explained the situation (Tr. 62–63). During this three minute conversation, Smith, who was on the opposite side of the street, observed petitioner (Tr. 83). In court, Smith identified petitioner as the man with whom Updike had conversed (Tr. 83–85, 87). At the bank, Updike received $10,000, consisting of $7,000 in twenty dollar bills and $3,000 in hundred dollar bills (Tr. 62, 73, 84).

When Updike returned to the savings and loan, however, petitioner had disappeared (Tr. 63, 85). After waiting for petitioner for some time, Updike returned home (Tr. 63, 85–86). Shortly after he arrived, he received a telephone call directing him to

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[3] The trip, from Updike's apartment at 1126 Eleventh Street, N.W., to the savings and loan at Second Street and Pennsylvania Avenue, S.E., took 30 to 45 minutes (Tr. 54, 61).

[4] According to petitioner, he met his unidentified accomplice at Bennie's Bar where the two men drank and carried on a conversation for several hours until the tavern closed (Tr. 143, 150–151).

take the money to 12th and L Streets, N.W. (Tr. 63). When he arrived there, he was met by the supposed police detective, who led him into the Albert Pick Motel and took the $10,000 (Tr. 64, 74–75). As Updike left, he observed petitioner enter the motel and proceed in the direction of the other man (Tr. 65–66, 75–76).

At the time of petitioner's arrest, a search revealed $800, in twenty-dollar bills, on his person. (Tr. 102–105). In a later search of his apartment, pursuant to a search warrant, police discovered $1,000, also in twenty-dollar bills (Tr. 105–108).

In his charge to the jury, the trial judge gave the following instruction regarding the intent necessary to convict petitioner of the crime of false pretenses (Tr. 185–187):

> Intent to defraud generally cannot be proved directly because as I have already stated to you in connection with knowledge, there is no means of fathoming the operation of the mind of another person.
>
> But intent may be inferred by you from things spoken, things done, and all the other surrounding circumstances. It may be inferred that one intends the natural and probable consequences of his act, but you are not required to so infer.
>
> Intent to defraud may be imputed to a person if the evidence shows that he has obtained something of value from another person by means of false representations, knowingly made with intent to induce the action taken by the other.

As for the intent necessary for conviction of grand larceny the judge stated (Tr. 190–192):

> [T]he property must have been unlawfully taken from the possession of another with the intent on the part of the taker to convert it to his own use. * * *
>
> [I]f a person by trick or fraud obtains the property of another with intent to convert it to his own use, and thereafter does so convert it, that would be larceny, and if the defendant were guilty of that in this case then he would be guilty under this indictment.
>
> It is necessary, however, that in a case of this kind, where the charge is obtaining personal property by trick or fraud, that at the time it is obtained there must be the fraudulent intent at that time by the party taking it, to convert it to his own use. If he takes it without any intent to convert it to his own use, that would not be larceny, and if that was the circumstance that the jury found to be fact, the defendant would not be guilty. The question here is, did the defendant acquire this money by trick or fraud and at the time intend to convert it to his own use, and did he later convert it to his own use.

Defense counsel did not object to the jury instructions, stating, in fact, that the court "covered it well." He did not request an instruction on intoxication (Tr. 193–194).

ARGUMENT

1. Petitioner contends that the court erred in its charge on the requisite intent regarding false pretenses because it instructed that the jury could infer that one intends the natural and probable consequences of his acts, without adding that such acts must be "knowingly done." However, as the court of

appeals held, the charge as a whole included references to the requirement of knowledge and therefore there was no "plain error" (Pet. App. 6a). In his instruction regarding the crime of false pretenses, the trial judge twice referred to the requirement of knowledge of falsity (Tr. 186). He explained, moreover, that the "intent to defraud may be imputed to a person" when "he has obtained something of value * * * by means of false representations, knowingly made with intent to induce the action taken by the other" (Tr. 187).

2. Petitioner also asserts that the court erred by not instructing the jury, *sua sponte,* regarding the effect which intoxication may have on the ability to form a specific intent to commit the crimes in question. He contends that his testimony was a sufficient foundation to require such an instruction. Petitioner testified that he had been drinking the night before the crime and that he did go home to bed (Tr. 143, 150–151). The following morning, he testified, he felt sick from the aftereffects of drinking (Tr. 142–144) and was "under the intoxication of that night before" (Tr. 145). These statements were not supported by any other witness.

An instruction on intoxication is necessary only if an adequate evidentiary foundation has been laid. *Kane* v. *United States,* 399 F. 2d 730, 736–737 (C.A. 9), certiorari denied, 393 U.S. 1057; *Heideman* v. *United States,* 259 F. 2d 943, 946 (C.A.D.C.), certiorari denied, 359 U.S. 959. As the court of appeals concluded, such a showing was not made here. At worst,

petitioner was suffering from a hangover. That condition raises no question of petitioner's ability to form the requisite intent.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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